F.M.S. REPORTS.

[APPELLATE CIVIL JURISDICTION]
THOMAS, C.J., BURTON, Ag. C.J. (S.S.)
and TERRELL, J.
August 16, 1935.

JOHN EDGAR JONES.....(Appellant)

v.

P.L.S.K.R. PALANIAPPA CHETTY.....
(Respondent)

[PERAK CIVIL APPEAL No. 12 of 1934]

Practice—Appeal to Privy Council—leave to appeal—"application"—time—F.M.S. Appeals Order in Council, Rule 4.

By rule 4 of the Rules of December 16, 1912 "applications to the Court for leave to appeal shall be made by motion or petition within 21 days from the date of judgment to be appealed from and the applicant shall give the opposite party notice of his intended application."

A judgment was pronounced by the Court of Appeal on the 2nd May, 1935. Notice of Motion for leave to appeal to the Privy Council was filed by the respondent on the 22nd May 1935, but was not served until the 6th August 1935. The Motion was fixed for hearing on the 12th August 1935, being the first day of the sittings of the Court of Appeal.

Held by the Court of Appeal, that the notice of motion having been filed within 21 days from the date of the judgment appealed from, the "application" was made within the time prescribed by Rule 4.

MOTION for leave to appeal to the His Majesty in Council.

B. K. Das for the respondent (applicant on the Motion).

E. D. Shearn for the appellant (respondent on the Motion).

Cur. Ad. Vult.

The Court of Appeal (**THOMAS, C.J., BURTON, AG. C.J., (S.S.)** and **TERRELL, J.**) gave the following joint judgment:—

The Judgment of the Court of Appeal was pronounced on the 2nd May 1935 against the respondent. On 22nd May the respondent filed a Notice of Motion for the 12th August, the first day of the sittings of this Court of Appeal for leave to appeal to His Majesty in Council. The Motion was not served until the 6th of August 1935.

It is contended that the application is out of time. Rule 4 of the Rules of 16th December 1912 is as follows:—

> "Applications to the Court for leave to appeal shall be made by Motion or petition within 21 days from the date of Judgment to be appealed from and the applicant shall give the opposite party notice of his intended application."

The wording of this rule corresponds closely with the wording of 0.64 R.14 and under that Rule it has been held that service of the Notice of Motion is the making of the application. *In Corporation of Huddersfield* v. *Jacomb*, 17 Equity Cases at page 485 Malins V.C. said, "But surely the complaint began when a notice of the objection was given to the other party which brought both parties before the Court." In *Smith* v. *The Parkride Mining Co.*, 6 Q.B.D. 67 this principle was followed and in *Re Gallop* v. *Central Queensland Meat Export Co.*, 25 Q.B.D. 230 it was applied to 0.64 r 14. We do not think there is necessarily any analogy between the procedure to set aside an Arbitration Award and in Appeals. It is true that the word Application which is interpreted in the cases cited occurs in Rule 4 but there does not seem to us to be any reason why this pregnant use of the word "Application" should be extended to this Rule especially as the Rule as drafted contains the direction for service outside and apart from the limitation of time contained in the first part of the Rule. If the rule had been intended to bear the meaning which is contended for, it would have been very easy to draft it so as to be perfectly clear. Ordinarily in Appeal it is sufficient that Notice be filed within time and and it is usually a fourteen day notice.

There is no provision that it be served within the time limited for the Appeal and we see no reason for importing this special meaning of the word "Application" into the Rule.

We think therefore that the application is in time.

The appellant must within three months enter into good and sufficient security to the satisfaction of the Registrar in the sum of £500 in the term of Rule 5 (a) and the record must be ready for despatch to England within 3 months. Costs in the cause.